UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

EVERPORT TERMINAL SERVICES INC. and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1546, AFL-CIO; AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1414, AFL-CIO INTERNATIONAL LONGSHORE AND WAREHOUSE UNION and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1546, AFL-CIO; AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1414, AFL-CIO	**Case 32-CA-172286** **Case 32-CB-172414**

ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS BY EVERPORT TERMINAL SERVICES INC.

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I. INTRODUCTION

The Charging Party's exceptions and supporting brief present a series of issues that have no place in this case. All of the issues raised by the Charging Party are outside the scope of the General Counsel's complaint, and most of them are directly contrary to the specific facts alleged and theories asserted in the General Counsel's complaint. For example:

- The Charging Party alleges that the Pacific Coast Longshore & Clerks Agreement ("PCL&CA")—including its subpart applicable to longshore workers and mechanics, the Pacific Coast Longshore Contract Document ("PCLCD")—is an unlawful agreement, while the General Counsel specifically alleges that it is the governing collective bargaining agreement for the longshore industry.

- The Charging Party alleges that the Pacific Maritime Association ("PMA") is not a lawful multi-employer bargaining association, while the General Counsel specifically alleges that it is a multi-employer bargaining association.

- The Charging Party challenges the validity of the coast-wide longshore bargaining unit, while the General Counsel avers that "[t]he nature and the existence of the underlying coastwide unit isn't in dispute." (Tr. 2018:10-11.)

As the General Counsel is master of the complaint, the Administrative Law Judge ("ALJ") properly rejected these theories for contradicting and reaching outside the bounds of the case as presented and litigated by the General Counsel, and the Board should do the same.

In addition, the Charging Party has requested a host of additional remedies, all of which are extraordinary and punitive in nature, without presenting any of the underlying facts or evidence necessary to support imposition of an extraordinary remedy. Indeed, no extraordinary remedies can be imposed here, where Everport has never previously been found guilty of any unfair labor practices and, as the ALJ found: "Everport is not a recidivist and a broad order is not warranted." (ALJD 79 n. 65.) Imposition of any such additional remedies under these

circumstances would be punitive and violate the fundamental guiding principle of remedies under the National Labor Relations Act: the Act is remedial, not punitive.

In sum, the Board should reject all of the exceptions raised by the Charging Party.

II. THE CHARGING PARTY'S EXCEPTIONS SHOULD BE REJECTED IN THEIR ENTIRETY

A. The Additional Issues Raised by the Charging Party Are Outside the Scope of the General Counsel's Complaint—If Not Contrary to It—and Therefore Must Be Rejected

1. The General Counsel Is Master of the Complaint

The General Counsel is the master of the complaint. As such, the General Counsel—not the Charging Party—determines the complaint's content. This standard is upheld even where the "record evidence would support the additional allegations." *GPS Terminal Servs.*, 333 NLRB 968, 969 (2001). The Board has explicitly upheld this principle on several occasions. *See*, *e.g.*, *Castaways Hotel & Casino*, 284 NLRB 612, 614 n.5 (1987) (ruling the General Counsel "generally has the authority to frame the issues in this case" and that "finding a violation not alleged in the complaint nor argued at trial 'improperly intrude[s] on the General Counsel's authority to frame the . . . case.'") (quoting *Florida Steel*, 224 NLRB 45 n.2 (1972)) (citing *Int'l Broth. Electric Workers & Pac. Elec.*, 264 NLRB 712 n.3 (1982)). The basis for this fundamental principle arises from deference to the General Counsel's decisions as to how to litigate a case and an unwillingness to "circumvent [the General Counsel's] authority." *Castaways*, 284 N.L.R.B. at 614 n.5 (*quoting Florida Steel*, 224 NLRB at 45 n.2).

The General Counsel agrees with Respondents that it controls the claims and theories at issue in this case, not the Charging Party.[1]

[1] Tr. 57:25-58:5 ("Your Honor, and it's our position that we control the theory of the complaint."); Tr. 1698:3-7 ("[T]he scope of the theory of the case being prosecuted is dictated and controlled by the complaint and by the General Counsel, not by Mr. Rosenfeld.").

2. The Complaint Governs the Issues that Can Be Considered by the ALJ or the Board

It is a well-established principle of law that the ALJ's consideration of a case before her is "limited to the issues specifically framed by the complaint." *Typographical Union Local 16 (Chicago Newspaper Publishers Ass'n)*, 86 NLRB 1041, 1071 n.7 (1949) ("Consideration of the refusal to bargain aspect of this case will be limited to the issues specifically framed by the complaint."). The ALJ must "decline to consider arguments in the Charging Party's brief that are inconsistent with the … General Counsel's theory of the case as set forth in the complaint." *United Nurses*, 359 NLRB 469, 477 n.4 (2012). Issues that "fall outside the scope of this complaint … need not, and will not, be considered here." *Id.* This is, in part, because the "Board and the courts have long held that the General Counsel under Section 3(d) of the Act has broad power over the initiation and prosecution of complaints in unfair labor practice proceedings." *California Saw & Knife Works*, 320 NLRB 224, 276 (1995).

Thus, "the complaint only encompasses what the General Counsel states that it encompasses, no more. Where the General Counsel has opposed the Charging Parties or where the Charging Parties' arguments go clearly beyond the reach of the complaint as issued and prosecuted by the General Counsel, the Charging Parties' arguments fail ... on the grounds that only the General Counsel may adopt and include such arguments in a complaint under the Act." *Id.*

Therefore, the ALJ must "confine [her] findings, analysis, and conclusions here to the General Counsel's complaint allegations and the theories he asserted in support thereof. The Charging Parties theories and allegations, where inconsistent with the position of, or opposed by the General Counsel, will not be further addressed." *Id.*; *see also A-1 Door & Bldg. Sols. & Millmen & Indus. Carpenters Union, Local 1618, United Bhd. of Carpenters & Joiners of Am.*, 356 NLRB 499, 505 (2011) (ALJ refused to make findings regarding issue not pleaded in General Counsel's complaint: "No such finding is required in order to decide the limited issues alleged in the complaint and litigated before me."); *Teamsters Local 1205 (Atl.-Pac. Mfg. Corp.)*,

122 NLRB 1215, 1241 (1959) ("The power to fashion a remedy, however, is limited by the issues framed by the complaint."); *Int'l Bhd. of Elec. Workers, Local 6*, 318 NLRB 109, 143 n.26 (1995) ("This matter is exclusively limited to the issues raised by the complaint under the Act and has been resolved on that basis.").

Thus, alternative theories and facts raised by the Charging Party but not alleged in the Complaint are not relevant and should not be considered. *See, e.g.*, *Superior Press, Inc. (Printing Pressmen)*, 148 NLRB 406, 413 n.9 (1964) (refusing to consider "testimony [that] is not relevant to this allegation of the complaint"); *In Re B.A. Mullican Lumber & Mfg. Co.*, 11-CA-19451, 2002 WL 31718346 (NLRB Div. of Judges Nov. 27, 2002) (refusing to consider the parties' additional arguments, "[r]egardless of the respective of merits of the parties' positions," because "those matters are not relevant [to] the complaint allegation.").

The Board's lengthy note in *United Nurses* is instructive. In *United Nurses*, similar to this case, "[t]hroughout the hearing, and in his exceptions brief, counsel for the Charging Party expressed repeatedly his dissatisfaction with the Acting General Counsel's theory of the case, arguing that the financial information that the Union provided had not been audited and was not accurate. In support of this allegation, counsel for the Charging Party sought to adduce extensive evidence that was beyond the scope of the complaint. ..." 359 NLRB at 477 n.4 (2012). Nevertheless, the Board "decline[d] to consider arguments in the Charging Party's brief that are inconsistent with the Acting General Counsel's theory of the case as set forth in the complaint." *Id.* Recognizing that "[a] charging party cannot enlarge upon or change the General Counsel's theory of the complaint," the Board concluded that the Administrative Law Judge "correctly found that the proffered evidence was simply not relevant to the complaint." *Id.*

Like the charging party in *United Nurses*, the Charging Party here, throughout the hearing and now again in its exceptions, has repeatedly sought to introduce alternative theories and evidence completely disconnected from the General Counsel's theory of the case and without any relevance to the allegations in the Complaint. During the hearing, when the Charging Party attempted to raise the same alternative theories and allegations, the ALJ rejected

them as too far afield from the allegations and theories of the Complaint: "Thank you for playing. No go. ... Next contestant."[2] The Board should follow suit and reject these distractions and irrelevant theories and rather focus only on the issues framed by the Complaint.

3. The Charging Party's Alternative Theories Are Outside and Contrary to the Complaint, Cannot Be Considered, and Lack Merit in Any Event

In her decision, the ALJ specifically rejected all of the issues that the Charging Party now raises in its exceptions as beyond the General Counsel's allegations and, therefore, improper:

> The Machinists raise additional allegations of unlawful conduct beyond the scope of General Counsel's complaint. These allegations include: Costs of the Joint Dispatch Hall, a hiring hall, are primarily borne by PMA, rather than solely by ILWU, and non-member payments funneled to the Joint Port Labor Relations Committee; the agreement between PMA and ILWU for Herman/Flynn discriminates against employees; PMA is not a bona fide multi-employer association; and the agreement violates Section 8(e) ("hot cargo") of the Act. General Counsel put forth none of them and I sustained objections to Charging Party's lines of questioning related to Charging Party's theories. As General Counsel controls the theories of the case, I decline to make any findings regarding Charging Parties' theories. Its request for an additional remedy is discussed below.

The ALJ properly rejected these alternative theories, and the Board should do the same.

a. There is no legitimate dispute that the PMA is a valid multi-employer association because the General Counsel confirms that it is in the Complaint

In the Complaint, the General Counsel specifically alleges that "the Pacific Maritime Association (PMA) [is] a multi-employer bargaining association which, together with the ILWU, administers the Pacific Coast Longshore and Clerks Agreement (PCL&CA), the coast wide collective-bargaining agreement between the PMA and Respondent ILWU."[3] The General Counsel repeatedly reaffirmed its position that the PMA is a "multi-employer association" at trial

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[2] RT 18 at 4010:15-4011:1.

[3] GC Complaint ¶ 8(a).

as well, including as early as in its opening statement.[4] Thus, neither the General Counsel nor the Charging Party can contest that the PMA is a valid multi-employer bargaining association and party to a legitimate multi-employer bargaining unit. *See, e.g., ILWU Local 119*, 266 NLRB 193, 194 (1983) (identifying PMA as "a multiemployer bargaining association"); *Gen. Truck Drivers Local 692*, 258 NLRB 412 (1981) (same).

b. The Charging Party's theories under 8(e) were specifically rejected by the General Counsel and must therefore be rejected by the Board

A number of the Charging Party's exceptions and arguments in the supporting brief rely on claims that Respondents' conduct violated section 8(e) of the Act. These claims were specifically and repeatedly rejected by the General Counsel at the hearing of this matter. For example, the General Counsel openly stated:

- "Your Honor, and it's our position that we control the theory of the complaint. ... So no, we have no intent, and it's not in the complaint and we don't foresee amending the complaint to include 8(e)." (Tr. 57:25-58:5.)

- "Well, it's true that there's not an 8E allegation in the complaint and that the theory that—the scope of the theory of the case being prosecuted is dictated and controlled by the complaint and by the General Counsel, not by [counsel for the Charging Party] Mr. Rosenfeld." (Tr. 1698:3-7.)

The ALJ agreed, holding that claims under 8(e) are not "relevant here." (ALJD 65:8-9.) In sum, the Charging Party's exceptions involving a theory based on section 8(e) violations should be rejected in their entirety.

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[4] *See* RT 2 at 48:21-23 ("Everport joined the multi-employer association Pacific Maritime Association or PMA on or about June 30th, 2015."); RT 7 at 1585:12-14 (characterizing the PMA as "the multi-employer"); RT 10 at 2007:12-13 (referring to the PMA coast-wide unit as a "multi-employer unit").

a. There is no legitimate dispute that the coast-wide longshore bargaining unit is an appropriate unit

In the words of counsel for the General Counsel, "The nature and the existence of the underlying coastwide unit isn't in dispute."[5] Indeed, according to the General Counsel, Everport's evidence regarding the historic coast-wide unit is not relevant under the General Counsel's theory of the case.[6] Of course, Everport has shown in its exceptions the relevance of the unique, historic coast-wide unit to its various defenses and therefore disputes the General Counsel's contention. But one thing that is clear and that the parties agree upon is that there is no dispute about the appropriateness of the coast-wide longshore bargaining unit first recognized by the Board more than 80 years ago.

b. The General Counsel is not challenging the ILWU's and PMA's interpretation of the PCL&CA and the Charging Party lacks standing to do so

The parties to the PCL&CA—the PMA and the ILWU—are in accord in their shared interpretation of the PCL&CA as it pertains to the ILWU's M&R jurisdiction and Everport's obligation, as a PMA member, to exclusively recognize the ILWU as the bargaining representative of the coast-wide longshore unit, including those performing M & R work at the Nutter Terminal. The General Counsel is not contesting the shared understanding of the parties to the PCL&CA and their agreed-upon interpretation of the meaning and scope of the so-called "red circle" exception set forth in the PCL&CA, nor is the legality of the long-upheld PCL&CA at issue in this case. Further, not only are the Charging Party's alternative theories of no moment, as set forth above, but the Charging Party lacks standing to challenge the parties agreed-upon interpretation of their contract in any event.

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[5] RT 10 at 2018:10-11; *see also* GC Complaint at ¶ 8(a) (alleging the PCL&CA is a "coast wide collective-bargaining agreement").

[6] RT 10 at 2007:8-2008:9 (arguing the "long history of this West Coast coastwide unit ... is completely irrelevant.")

(1) The Complaint does not allege the PCL&CA is unlawful and the General Counsel has repeatedly confirmed it is not challenging the ILWU's and PMA's interpretation of the agreement

Nowhere in the Complaint does the General Counsel allege that the PCL&CA is unlawful. Rather, the Complaint presupposes the validity of the PCL&CA. For example, the Complaint alleges that after joining the PMA but before commencing operations, Everport applied and enforced the terms of the PCL&CA. The only unfair labor practice that the General Counsel claims arose from Everport's application of the PCL&CA, however, is its application to the former MTC/MMTS mechanics in the face of alleged successorship obligations. The General Counsel does not contest the validity of the PCL&CA provisions regarding the employment of the maintenance and repair mechanics as a basis for any violation of the NLRA. Moreover, the Complaint does not contain any allegations accusing Everport of unfair labor practices by its concurrent application and enforcement of the PCL&CA to the hundreds of longshoremen, marine clerks, and incumbent longshore mechanics. The Complaint's narrow focus on the alleged successorship obligations to the MTC/MMTS mechanics and acceptance of the lawful application of the PCL&CA to the vast majority of workers at the Nutter Terminal is necessarily an admission that the PCL&CA itself is valid and its application and enforcement alone does not give rise to an unfair labor charge.

Further, as counsel for the General Counsel stated on the record at the hearing, "[W]e're not here to ask you to enforce the red circle. So our theory is there was a violation of the Act not a contract violation that would be subject of a 301 action."[7] In fact, counsel for the General Counsel repeatedly confirmed that the General Counsel is not contesting the validity of the PCL&CA or the parties' interpretation of any provision of the PCL&CA. For example, counsel for the General Counsel stated that the contract interpretation issue (and the red circle in

[7] RT 10 at 2170:1-4.

particular) was "not the General Counsel's theory in this case," and confirmed that the General Counsel would "adhere to [its] threshold position that the whole red circle thing is irrelevant."[8]

(2) The Charging Party lacks standing to challenge the parties' agreed-upon interpretation of the PCL&CA

As the Supreme Court recently recognized, "collective-bargaining agreements" must be interpreted "according to ***ordinary principles of contract law***." *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) (emphasis added). "In this endeavor, as with any other contract, ***the parties' intentions control***." *Id.* at 933 (emphasis added).

Here, the Charging Party, which is not a party to the contract, wishes to turn this principle on its head, arguing that the shared understanding of the parties to the PCLCD is wrong. Neither the General Counsel nor the Charging Party are parties to or otherwise enjoy privity with the PCLCD. For this reason they cannot question the actual parties' construction of the agreement.

Under ordinary principles of contract interpretation it is "well established ... that a stranger to a contract has no standing to challenge the parties' mutual understanding of their own contract." *Sec. Serv. FCU v. First Am. Mortg. Funding LLC*, 771 F.3d 1242, 1246 (10th Cir. 2014); *accord e.g.*, *JPMorgan Chase Bank, N.A. v. First Am. Title Ins. Co.*, 750 F.3d 573, 582 (6th Cir. 2014); *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 107 (2d Cir. 2009); *McClain v. First Mortg. Corp.*, 2015 WL 11199074, *2 (C.D. Cal. March 16, 2015); *Milestone Shipping, S.A. v. Estech Trading LLC*, 811 F. Supp. 2d 915, 923 n.5 (S.D.N.Y. 2011); *JPMorgan Chase Bank, N.A. v. First Am. Title Ins. Co.*, 795 F. Supp. 2d 624, 632 (E.D. Mich. 2011).

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[8] RT 5 at 973:10-14 ("[J]ust so Your Honor is clear on our position, is that this mentions red circle and just so we're clear, once again, red circle is a contractual concept, it's not a—it's not the General Counsel's theory in this case."); RT 17 at 3771:10-13 (explaining that the contractual issues was a fight brought by the Charging Party, and confirming the General Counsel would "adhere to [its] threshold position that the whole red circle thing is irrelevant."); *see also* RT 2 at 57:25-58:5 ("Your Honor, and it's our position that we control the theory of the complaint. . . . So no, we have no intent, and it's not in the complaint and we don't foresee amending the complaint to include 8(e)."); RT 8 at 1698:3-7 ("Well, it's true that there's not an 8E allegation in the complaint and that the theory that -- the scope of the theory of the case being prosecuted is dictated and controlled by the complaint and by the General Counsel, not by Mr. Rosenfeld."); RT 13 at 2716:20-24 ("[W]e agree with Mr. Remar that there's no allegation in the complaint under 8E and the complaint certainly doesn't contend that the subcontracting provision in the PCLCDC is unlawful on its face.").

The well-settled axiom that, "as with any other contract, the parties' intentions control" dictates that, when the parties to a contract agree as to its meaning, the issue is settled. *M & G Polymers USA, LLC*, 135 S. Ct. at 933. Indeed, such a shared understanding will govern even if it is seemingly at odds with the language employed in a written agreement. As Judge Easterbrook famously observed, "under the prevailing will theory of contract, parties, like Humpty Dumpty, may use words as they please. If they wish the symbols 'one Caterpillar D9G tractor' to mean '500 railroad cars full of watermelons,' that's fine — provided the parties share this weird meaning." *TKO Equip. Co. v. C & G Coal Co., Inc.*, 863 F.2d 541, 545 (7th Cir. 1988).

Here, the parties to the PCLCD agree that it bound Everport to bargain exclusively with ILWU. Neither the General Counsel, nor the Charging Party, has standing to challenge this understanding. *See Sec. Serv. FCU*, 771 F.3d at 1246; *JPMorgan Chase Bank, N.A.*, 750 F.3d at 582; *Premium Mortg. Corp.*, 583 F.3d at 107; *McClain*, 2015 WL 11199074 at *2; *Milestone Shipping, S.A.*, 811 F. Supp. 2d at 923 n.5; *JPMorgan Chase Bank, N.A. v*, 795 F. Supp. 2d at 632.

B. The Charging Party's Reliance on *PAOH* and *PCMC* As Bases for a Finding of Unlawful Recognition Is Misplaced; Those Cases Are Inapposite

The Charging Party makes a meritless attempt to extend the decisions in *Pacific Crane Maintenance Company, Inc.*, 362 NLRB No. 120 (2015), *enf'd* 880 F.3d 1100 (D.C. Cir. 2018) ("*PCMC*"), and *Ports America Outer Harbor*, 366 NLRB No. 76 (2018) ("*PAOH*"), to this case. The facts underpinning both of those cases differ significantly from the present case, dictating a different outcome here.

1. The Facts and Legal Issues in *PCMC* Differ Fundamentally from This Case

Each of the following aspects of *PCMC* place it squarely on different footing than the present case, rendering the legal conclusions in that case inapplicable here. For these reasons, the ALJ's reliance on these cases and the Charging Party's arguments in support of its exceptions should be rejected.

- **<u>Single employer status in *PCMC*</u>:** The crux of the ruling in *PCMC* is that "PCMC and PMMC stipulated that they were a single employer." *PCMC*, 890 F.3d at 1106. The D.C. Circuit acknowledged: "***Our conclusion turns heavily on PMMC and PCMC's single-employer stipulation***." *Id*. at 1110 (emphasis added).[9] Here, in contrast, there is no evidence—or even allegation—of single employer status. The General Counsel and Charging Party have neither alleged nor proven that Everport had a prior relationship with the IAM, is a single or joint employer with any entity that had a relationship with the IAM, or ever withdrew recognition from the IAM.

- **<u>No successorship issues in *PCMC*</u>:** Due to the single employer stipulation, *PCMC* was not a successorship case. *Id*. at 1106 ("The [GC] disavowed any 'successor' or 'alter ego' theories of liability…"). Here, conversely, successorship is the ***only theory*** upon which any alleged bargaining obligation rests.

- **<u>No circumstances creating an obligation to bargain</u>:** In *PCMC*, the employer incurred a bargaining obligation because recognition of the IAM was required as a condition of purchasing the terminal. *Id*. at 1103. Conversely, here, no circumstances existed to give rise to a bargaining obligation with the IAM. The GC failed to prove—or even allege—that Everport was obligated to hire IAM-represented mechanics either under the Oakland Worker Retention Ordinance or as a "perfectly clear" *Burns* successor, and—for all the reasons set forth in Everport's exceptions and supporting brief—the ALJ's finding of successorship based on discriminatory hiring

[9] The underlying Board decision is equally distinguishable. The Board similarly based its decision on a "transfer of work and the unit of employees who performed that work from one company to a related company … [which] constituted a single employer … [where] the single employer withdrew recognition from the union that had represented the employees for over 40 years." *Pacific Crane Maintenance Co.*, 359 NLRB 1206, 1207 (2013). No such circumstances exist here.

should be rejected.[10]

- **No evidence supporting accretion in *PCMC*:** The D.C. Circuit in *PCMC* rejected the employer's accretion argument for reasons inapplicable here. In *PCMC*, "the very same group of employees continued their daily work" for the same, stipulated "single employer." *Id*. at 1112. "The only changes were their uniforms … and the union representing them." *Id*. at 1111. The facts here are considerably different. Everport has established the presence of all of the traditional accretion factors.[11] It has implemented substantial changes that affect the terms and conditions of work for mechanics at the Nutter Terminal.[12] Where the mechanics in *Pacific Crane* were not integrated even after several months, the work and working circumstances of the Everport mechanics are completely indistinguishable from that of other mechanics in the coast-wide longshore unit.

- **No well-defined plan in *PCMC*:** *PCMC* and its underlying NLRB decision turned on the absence of a well-defined plan to change operations. *Id*. at 1111-12. Unlike *PCMC*, Everport had a well-defined plan to change operations at the Nutter Terminal. Undisputed evidence at trial proved that Everport actually implemented this plan, including (among many other components) an overall business objective of doubling cargo volume from 150,000 to 300,000 lifts per year; spending approximately $18 million on terminal and cargo handling equipment upgrades; and increasing the

[10] *See* Everport's Exceptions Nos. 47-109 and Supporting Brief, pp. 16-48.

[11] *See* Everport's Exceptions Nos. 19-36 and Supporting Brief, pp. 29-37.

[12] *See* Everport's Exceptions Nos. 19-36 and Supporting Brief, pp. 29-37. As demonstrated at hearing and in the brief, these changes include: (i) increase in the number of mechanics; (ii) new additional tools and equipment; (iii) new operating and data systems; (iv) new management for mechanics; (v) responsibility for new job functions, including mandatory roadability inspections, tire mounting and dismounting, and reefer monitoring; (vi) new monitoring technologies; (vii) changes to cargo services and increasing cargo volume; and (viii) upgraded terminal to handle larger cargo surges with larger vessels that generate up to twice as many container moves.

number of mechanics to 40.[13] Thus, the accretion analysis here must take into account the full integration and interchange that has occurred throughout the expansion of Everport's operations to at least the completion of the hires posted on June 8, 2016.

- **Everport's changes did not stem solely from adopting the PCL&CA:** The only changes to the historical IAM bargaining unit identified by the respondents in *PCMC* were "impermissible changes" resulting directly from the unfair labor practices alleged in that case. *Id*. at 1112. Here, by contrast, most of the changes on which Everport relies—for example, its expenditure of $18 million on terminal upgrades and equipment used by its mechanics—have no connection whatsoever to recognition of the PCL&CA. And those changes that do bear some connection to recognition of the PCL&CA do not stem solely from that recognition. For example, Everport did not assign roadability and tire mounting to mechanics solely because of the PCL&CA—both of those functions were revenue-generating processes for Everport, providing the incentive to engage in the tasks over and above the PCL&CA work jurisdiction requirements.[14] Thus, unlike the changes in *PCMC*, Everport's changes must be taken into account here and cannot be dismissed.

- **Everport's decisions were not based on labor costs:** The D.C. Circuit relied heavily on its conclusion that the decision to close PMMC "always was focused on the concept that there were differences in labor costs." *Id*. at 1105. In contrast here, none of the changes involved in Everport's well-defined plan have been motivated by labor

[13] *See* Everport's Exceptions Nos. 19-36 and Supporting Brief, pp. 29-37.

[14] Tr. 3741:1-3742:2; 3743:19-3744:21; *see also* Everport's Post-Trial Brief, pp. 43.

costs—in fact, many of the changes have ***increased*** labor costs.[15]

- **No requirement to join the ILWU:** *PCMC* relied on the finding that newly hired mechanics were required to ***join*** the ILWU. *Id*. at 1106 n.7, 1112 n.12.[16] Everport, in contrast, never required anyone to ***join*** the ILWU. Mechanics became ***registered*** with the Joint Dispatch Hall, but registration is not union membership.[17]

2. The Facts and Legal Issues in *Ports America Outer Harbor* Differ Fundamentally from This Case

PAOH is a continuation of the same dispute at issue in *PCMC*, and analysis of the Board's decision in *PAOH* demonstrates that the facts of that case are equally different from the facts in this case:

- ***PAOH* relies completely on *PCMC*:** *PAOH* expressly relies on *PCMC* for the entirety of its finding that PAOH's recognition of the PCL&CA was unlawful. *PAOH*, 366 NLRB No. 76, at *3. Thus, for all the reasons identified above that distinguish *PCMC* from this case, *PAOH* is also inapposite.

- **No majority status here:** In *PAOH*, "there [was] no dispute that ***one hundred percent*** of the initial PAOH M&R steady workforce were previously employees of PCMC." *Id.* at *13 (emphasis added). Here, by contrast, the former MTC/MMTS Mechanics did not and could not constitute a majority of a proper unit at Everport, regardless of when majority status is measured.[18]

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[15] *See* Everport's Post-Trial Brief, pp. 71; GC 91.

[16] PCMC also violated sections 8(a)(1) and (5) "by removing IAM material posted on a bulletin board at the Maersk terminal." 890 F.3d at 1107 n. 11. There is no evidence of similar conduct by Everport in this case.

[17] *See* Everport's Exceptions No. 47 and Supporting Brief, p. 10; *see also* PCLCD § 8.14; Tr. 2057:9-19, 2057:24-2058:1, 2421:16-2422:3, 2615:24-2616:4, 2679:18-2680:3, 2750:1-7.

[18] *See* Everport's Brief in Support of Exceptions, pp. 47-48; Everport's Post-Trial Brief, pp. 70-76, 108-115.

- **<u>"Perfectly clear" successorship here</u>:** As the ALJ in *PAOH* stated: "[T]he issue of 'perfectly clear' successor is not now nor has it ever been at issue in this proceeding." *Id*. at *16. PAOH never claimed it was bound under the "perfectly clear" doctrine to obligations under the PCL&CA. The facts are dramatically different here, as "perfectly clear" successorship—by Everport to obligations under the PCL&CA—is a core defense litigated and established at hearing, which required Everport to recognize the PCL&CA.[19]

- **<u>No evidence supporting accretion in *PAOH*</u>:** The NLRB found that the unit in *PAOH* remained a separate group not accreted into the larger coast-wide unit, because non-crane mechanics continued to perform the same responsibilities, were not interchanged with other mechanics, and continued to work at different locations than crane mechanics. *Id*. at *3. Unlike *PAOH*, however, Everport has combined all mechanics into one M&R workforce. Everport no longer applies separate terms and conditions of employment as between crane and non-crane mechanics, as STS did with MMTS and MTC, and as PAOH and PCMC had in *PAOH*. This completely altered the conditions of employment for the former MTC/MMTS mechanics.[20]

- **<u>Timing of the substantial and representative complement</u>:** For all the reasons described in Everport's Brief in Support of Exceptions, pp. 34-37, and above, Everport's well-defined plan to change mechanic operations at the Nutter Terminal requires that the "workforce majority" requirement for successorship be measured as of June 8, 2016—timing much different than the "Day One" analysis applied in *PAOH*.

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[19] *See* Everport's Exceptions Nos. 14-18 and Supporting Brief, pp. 26-29.

[20] *See* Everport's Post-Trial Brief, pp. 66-70; *see also* Everport's Exceptions Nos. 19-36 and Supporting Brief, pp. 29-37

3. The Remedies Imposed in *PCMC* and *PAOH* Are Inapplicable Here

For all the reasons set forth here and Everport's Exceptions and Supporting Brief, no remedy is appropriate here. The contrast between this case and *PCMC* and *PAOH*, however, make imposition of an order requiring Everport to withdraw recognition from the ILWU and affirmatively bargain with the IAM particularly inappropriate.

First, unlike *PAOH* and *PCMC*, an affirmative bargaining order will not "serve[] the policies of the Act by fostering meaningful collective bargaining." *PAOH* at *6. "[T]he Act's twin pillars [are] freedom of choice ***and majority rule***." *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381-82 (D.C. Cir. 1983) ("Majority rule, with all its imperfections, is the best protection of workers' rights.") (emphasis added). Unlike *PAOH*, where 100% of the mechanics were forced to abandon representation from the IAM and accept ILWU representation, Everport never imposed ILWU representation on any existing, incumbent workforce. The majority of mechanics hired by Everport had not been represented by the IAM. An affirmative bargaining order will completely undermine the collective bargaining interests of a majority of Everport's mechanics and, likewise, the purposes of the Act.

Second, the relief sought by the General Counsel and Charging Party will not restore the *status quo*. *PCMC* held that PCMC should have recognized the IAM, not the ILWU; and *PAOH* held that—in consequence of *PCMC*—PAOH had a preexisting obligation to recognize the IAM. For this reason, *PAOH* held that the only effective remedy was to "restor[e] the *status quo* ante and require[e] the [employer] to bargain with the [IAM]." *PAOH* at *5. No such preexisting obligation exists here, however. The only preexisting obligation Everport had as a new terminal operator was under the PCL&CA through its PMA membership. Thus, the remedies sought here will not restore the *status quo*, but rather superimpose a new status that has never existed before.

Third, unlike *PAOH*, an affirmative bargaining order here will certainly undermine peace in the harbor. PAOH was no longer operating when the Board issued its decision in that case. Thus, no existing collective bargaining relationships were disrupted. A bargaining order here would upend existing relationships. Mechanics registered in the Joint Dispatch Halls would

cease working for Everport to retain their longshore registration status. The resulting lack of an adequate mechanic workforce would stop Everport's operations. Moreover, where Everport would continue to rely entirely on ILWU-represented labor for stevedoring operations and any newly IAM-represented mechanics will have to work next to ILWU workers on the terminal, the potential for disputes and disruption is significant. The proper course to ensure industrial peace is to dismiss the Complaint.

4. Neither *PCMC* nor *Ports America Outer Harbor* Warrants Imposition of a Broad Remedy Here

In both *PCMC* and *PAOH*, the NLRB declined to issue a broad order. As the ALJ in *PAOH* wrote, a broad order "is warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in … egregious or widespread misconduct..." *PAOH* at *16; *see also Hickmott Foods*, 242 NLRB 1357 (1979). Those circumstances do not exist here.

The NLRB has never found Everport liable for any prior violations of the Act. No pattern or practice of unlawful conduct exists. Moreover, Everport's conduct is not egregious. As in *PAOH*, "the issues [here] are complex." *PAOH* at *17. The parties' decisions here occurred in fluid circumstances, with complicated legal implications attending any course of action, as manifest by the length of the hearing and volume of evidence and testimony elicited. That is not a setting in which "egregious" violations of the Act may be found.

Furthermore, one of the more glaring differences between this case and *PAOH* or *PCMC* is that neither of the employers in those cases was operating and involved in the case at the time of the respective decisions. PCMC had settled out of the case in *PCMC* and PAOH had ceased doing business altogether. *PCMC*, 890 F.3d at 1104; *PAOH*, 366 NLRB No. 76 at *12 n. 13. Thus, *PCMC* and *PAOH* really involve inter-union clashes between the ILWU and IAM that set no precedent for factual findings or legal conclusions against an employer here—much less a different employer under different facts. The Charging Party's request that a broad order be issued to punish Everport for conduct to which it was not a party in prior intra-union Board cases is thus improper.

C. The Additional Remedies Sought by the Charging Party Are Extraordinary Remedies Not Justified by the Facts of This Case

Despite the ALJ's decision awarding the General Counsel all relief it sought, the Charging Party's exceptions seek numerous additional remedies not sought by the General Counsel, all of which are extraordinary and punitive in nature. Counsel for the Charging Party is well-familiar with Board law governing imposition of these extraordinary remedies. That law requires special allegations and findings, including evidence of egregious and recidivist violation of the Act. It is no surprise, therefore, that the Charging Party cites virtually no authority supporting imposition of these remedies against Everport under the circumstances of this case—no such authority exists.[21]

"[I]n selecting a remedy for NLRA violations, the NLRB must select 'a course that is remedial rather than punitive, and [choose] a remedy which can fairly be said to effectuate the purposes of the Act.'" *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1067 (D.C. Cir. 2001); *see also USW v. NLRB*, 646 F.2d 616, 630 (D.C. Cir. 1981) ("Certainly the Board has no power to 'punish' offending parties, as distinguished from 'remedying' unfair labor practices."). The U.S. Supreme Court has held:

> The Act is essentially remedial. It does not carry a penal program. … The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. …. The remedial purposes of the Act are quite clear. … [Board remedies] relate to the protection of the employees and the redress of their grievances, not to the redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and have been made whole.

Republic Steel Corp. v. NLRB, 311 U.S. 7, 10-11 (1940).

In addition, the Board has repeatedly held that special allegations and findings of recidivist, egregious, or widespread misconduct are required to support extraordinary remedies

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[21] The request for these remedies is thus frivolous and, we suspect, primarily intended as a means for the Charging Party to claim "aggrieved party" status regardless of the Board's ruling in this case, in an effort to engage in forum shopping on a petition for review to the federal circuit courts.

such as the reading of a notice, broad notice posting orders, special access, and special payment of fees. Extraordinary remedies are "warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods, Inc.*, 242 NLRB 1357, 1357 (1979). The record must disclose "persistent attempts to interfere with legislatively protected rights by varying methods." *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 929 (D.C. Cir. 2005). That is not the case here.

1. No Evidence Supports the Charging Party's Demand for Extraordinary Remedies in the Form of Special Notice Reading Orders

Extraordinary notice reading and posting orders must be justified by "egregious and widespread … misconduct." *Carwash on Sunset*, 355 NLRB 1259, 1263 (2010) (denying notice reading remedy as to respondent who "engaged in only one unlawful act … [that] [a]lthough serious, … does not warrant extraordinary remedies," as "traditional remedies will be sufficient to remedy that violation."). "The Board orders notice reading 'where the violations are so numerous and serious that the reading aloud of a notice is considered necessary to enable employees to exercise their Section 7 rights in an atmosphere free of coercion, or where the violations in a case are egregious." *United Rentals*, 349 NLRB 853, 853 n. 3 (2007) (denying request for notice reading remedy because respondent's violations—"although serious"—were not so numerous or egregious to warrant notice reading).

Here, Everport has never been found liable for any prior unfair labor practices. It is not a recidivist violator. Nor is its conduct in this instance, even if it were ultimately found to be a violation of the Act, egregious. Everport's actions cannot be characterized as blatant or obvious violations of the Act. The hearing of this matter occurred over 19 days. The ALJ's decision itself was approximately 90 pages long and took nearly a year to prepare. This is a complex case and Everport had to make decisions involving intricate issues in a fluid environment.

2. No Evidence Supports the Charging Party's Demand for Extraordinary Remedies in the Form of Special Notice Posting Rules

Like notice reading orders, extraordinary notice posting orders require special evidence and findings. Notably, the Charging Party's exceptions and supporting brief are bereft of any such evidence, because none was elicited at the hearing of this case. Absent evidence or findings that Everport is a recidivist violator, no extraordinary notice relief (e.g., website posting, widespread email posting, etc.) is proper—normal relief is sufficient.

In *Longview Fibre Paper & Packaging, Inc*., 356 NLRB 796 (2011), the Board affirmed the ALJ's decision not to award the extraordinary remedy of electronic posting where, at the hearing, no evidence was offered regarding the manner in which the respondent normally sent announcements or other messages to employees. The ALJ noted: "Counsel for the General Counsel did not raise this issue at the hearing, and in her posthearing brief she did not specifically seek this extraordinary remedy. As there is no evidence of record to support a contention that such an extraordinary remedy is in any way warranted in this case, I shall not require electronic posting." *Id*. at 808. Given the lack of evidence of recidivist violations, the Board also affirmed that "the traditional physical notice posting is adequate to remedy the Respondent's unfair labor practices."

In addition, no evidence at hearing suggested that email, the Company website, or other electronic communications are the customary means by which Everport communicated with the mechanics. The special electronic posting remedies requested by the Charging Party should therefore be rejected. *See, e.g., Fresh & Easy Neighborhood Mkt*., 356 NLRB No. 85 (Jan. 31, 2011) (rejecting requests for extraordinary relief in the form of intranet posting, posting in each of the respondent's stores, signing of the notice by the respondent's president, and reading the notice in all Respondent's stores because "the violations of the Act committed by the Respondent are of the type normally remedied by a standard Board Order and physical notice posting at the locations involved. There is no evidence that the Respondent is a recidivist violator of the Act. Further, there is no evidence of record to support counsel's contention that such an extraordinary

remedy is in any way warranted in this case."); *ManorCare Health Services-Easton*, 356 NLRB No. 39 (Dec. 1, 2010) ("I do not find the Respondent's conduct in violation of the Act supports such extraordinary remedies under current Board precedent. I therefore decline to direct them.").

3. No Evidence Supports the Charging Party's Demand for Extraordinary Remedies in the Form of Access and Visitation Rights

In order to support the extraordinary remedy of union access rights to a facility, "[t]he Board must demonstrate, through evidence and carefully articulated presumptions, that such effects have occurred or are likely to occur. In doing so, the Board must consider, for example, the seriousness of the violations involved, the amount of time between violations, and the extent to which employees know or may have reason to know of past incidents of unlawful conduct." *Florida Steel Corp. v. NLRB*, 713 F.2d 823, 827 (D.C. Cir. 1983) ("It is not a history of unlawful conduct that justifies access as a remedial measure, but rather it is the effects that such a history may produce.").

Here, no evidence of the conduct and practices required under *Florida Steel* was elicited at the hearing of this case. There is thus no basis for imposing the access remedies the Charging Party seeks. *See also Heck's Inc.*, 191 NLRB 886, 887 (1971), *enf'd in relevant part, Food Store Employees Local 347 v. NLRB*, 476 F.2d 546 (D.C.Cir. 1973), *rev'd in part on other grounds*, 417 U.S. 1 (1974) (rejecting request for direct access as remedial measure, holding that such a remedy is not warranted "unless, as is not established to be the case here, alternative means of access are clearly unavailable or have been tried and found wanting."); *USW*, 646 F.2d at 641 (denying access remedies; "We are no less disturbed than the Board by the extensive history of unlawful conduct of this employer. However, that history alone cannot justify the relief ordered in this case. We have already noted the factors that the Board must weigh before granting union access as a remedial measure. We repeat, for emphasis, that … the Board must find that it is reasonably foreseeable that the employees at these other locations have suffered coercive effects from the employer's unlawful conduct and that an access remedy is necessary to cure those effects. Absent these findings, the Board order at issue here cannot be justified as remedial

action, and can only be explained as containing punitive measures designed to deter future violations of the Act.").

4. No Evidence Supports the Extraordinary Reimbursement Relief Sought by the Charging Party

As noted above, the primary purposes of the Board's remedies are "the protection of the employees and the redress of their grievances," not the redress of any supposed injuries to union or the public. *Republic Steel Corp.*, 311 U.S. at 10-11. As the emphasis is on protecting employees, reimbursement to the mechanics themselves satisfies the NLRA's requirements. Awarding damages to the IAM rewards the union, not the employees, and would be punitive. It thus exceeds the power of the Board. That is particularly true because the issues in this case are complex and close, and Everport's defenses are not frivolous. *See, e.g., ManorCare Health Services-Easton*, 356 NLRB No. 39 ("As to the requested reimbursement of expenses, … '[t]his case turns to a large degree on credibility.' Because that is the case, and because I do not believe that the Respondent's defenses were frivolous, I decline to order reimbursement as requested by the Union.").

5. No Evidence Supports the Other Extraordinary Remedies Sought by the Charging Party

As with the remedies addressed above, the Charging Party's other requested remedies are extraordinary relief that cannot be awarded without evidence of pervasive, outrageous conduct by Everport. *See SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 439, 441 (2d Cir. 2011) (affirming NLRB's decision not to award extraordinary remedies; "We further conclude that the Board did not err by refusing to grant Local 32BJ extraordinary remedies. … [T]he NLRB declined the Union's request to order extraordinary remedies, finding that PBS's conduct was not 'so numerous, pervasive, and outrageous' as to warrant this relief.").

D. Counsel for the Charging Party's Conduct Warrants Imposition of Board Sanctions and His Accusations Regarding the Conduct of Everport Counsel Are Meritless

Counsel for the Charging Party's lack of remorse for his unprofessional conduct and his flippant attitude toward the ALJ and the admonition he has received demonstrate why the Board should act upon the ALJ's recommendation for sanctions. While he attempts to whitewash his conduct after-the-fact, counsel for the Charging Party's own words, as manifest by the transcript of proceedings at the hearing of this matter, illustrate why sanctions are appropriate:

- When Everport inadvertently sent documents subpoenaed by the General Counsel to Mr. Rosenfeld and asked him to return the documents, Mr. Rosenfeld refused: "I'm not cooperating ... I'm not … returning them and I'm looking at them … I'm not returning them. I'm looking at them. ... You make such accusations like this, you'll pay for it." (Tr. 36:3-15.)

- Mr. Rosenfeld regularly engaged in *ad hominem* attacks against counsel for Everport, Mr. Aktorianakis:

    - "MR. ROSENFELD: Objection. He hasn't proven that he's exhausted the witness' recollection before asking. And Mr. Akrotirianakis' rudimentary principles of evidence, I'm about to teach him something." (Tr. 3296:13-16.)

    - "MR. ROSENFELD: That wasn't my question. And he understood it. THE WITNESS: No, I understood it as -- MR. AKROTIRIANAKIS: No, he didn't understand it. MR. ROSENFELD: Sure, he did. THE WITNESS: -- I understood it as formatting. MR. ROSENFELD: That's right, I said formatting. And your lawyer wasn't listening. He doesn't always listen." (Tr. 3523:5-12.)

    - " MR. AKROTIRIANAKIS: Your Honor, I haven't really complained about like—the soliloquies, as you called them earlier—but we're never going to get

done if it's not just, you know, objection, then state the legal grounds, the way that we would do it in the courtroom. JUDGE STECKLER: Thank you. Mr. Rosenfeld, can you abide by that request? MR. ROSENFELD: Well, if I understand it. MR. AKROTIRIANAKIS: It's just conduct yourself the way you would -- in the way you would if we were in the United States District Court. MR. ROSENFELD: I think I resent the way he says that. I don't take it -- JUDGE STECKLER: Don't, don't. Let's not get emotional about this. MR. ROSENFELD: Well, it's not that. ***If he thinks the way he's handling this is the way he'd do it in the District Court, he'd be thrown out on his ear or on some other part of his body. This is incompetence***, but I'll do the best I can -- JUDGE STECKLER: That's -- MR. ROSENFELD: -- to comply with Your Honor. I will comply with Your Honor's request. JUDGE STECKLER: We're going off the record. MR. ROSENFELD: I'm just not going to -- JUDGE STECKLER: We're going off the record for five minutes. I don't have enough cookies for this. (Off the record at 4:29 p.m.)

JUDGE STECKLER: Okay. We're on the record. We had to take a break to get cooler heads to prevail and come back, after taking a few deep breaths. Now that -- at the beginning of the last week of hearing -- not this week but the previous week that we had, I went on the record and said that I was going to start admonishing people for conduct. I think I've reached that point. Mr. Rosenfeld, with your objections, it's like when you do that to Mr. Akrotirianakis with your statements, it's like poking a sleeping bear, and you know how to get his goat. And I am greatly disappointed that a senior member of the Labor Bar, with your experience and years, would see fit to do this. I know you're looking for a more interesting case, but it's greatly extending the record, and I would appreciate it if

you would not do this any longer. This behavior is beneath you. Do I make myself clear?" (Tr. 3788:5-3790:4; emphasis added)

- Mr. Rosenfeld repeatedly refused to regard the ALJ's rulings, e.g.:

    - "JUDGE STECKLER: I think I made my understanding clear. Mr. Rosenfeld, I don't want it hear about the potential subcontracting thoughts of Mr. Lang or what his perception was with Gregorio on this. Let's bring Mr. Lang back in. MR. ROSENFELD: I'm going to press this a little bit and obviously respect your ruling at some point, but --JUDGE STECKLER: At some point? MR. ROSENFELD: At some point." (Tr. 1870:16-23.)

    - "Q. The basis of your testimony is today what you learned from the member companies in the course of negotiations, correct? MR. REMAR: Your Honor, I thought you said no. JUDGE STECKLER: I thought . . . I did, too, but apparently not." (Tr. 2692:7-12.)

    - "JUDGE STECKLER: Mr. Rosenfeld, could you move into something a little more substantive here, please? MR. ROSENFELD: All right. Your Honor, I'm sorry. I think I'm entitled to press this in -- in an efficient manner. And let me try -- . . . MR. CHENEY: Your Honor . . . your very polite way of asking him to move on he keeps interpreting as his -- his right to -- to keep pursuing it. MR. ROSENFELD: That's right." (Tr. 2955:13-24.)

    - "JUDGE STECKLER: Paper. Okay. So anything -- so you -- Mr. Rosenfeld's trying to figure out whether you reviewed the thumb drive. Did you see any thumb drive in this process? THE WITNESS: I haven't seen a -- a thumb drive. JUDGE STECKLER: Okay. That's the end of it, Mr. Rosenfeld. You have to move on. Q BY MR. ROSENFELD: Well, how thick was the -- the amount of

paper you reviewed? . . . MR. REMAR: I thought we were moving on. JUDGE STECKLER: I thought we were moving on too, Mr. Rosenfeld. The objections are sustained. Do you -- do I . . . have to put it -- be so -- do I have to be so forward every time? MR. ROSENFELD: Then let's try to -- let me try to be wily here with it, Your Honor, so that -- . . . JUDGE STECKLER: I'm not up for wily, this morning, Mr. Rosenfeld, but thank you for your offer." (Tr. 2956:8-2957:8.)

- Mr. Rosenfeld repeatedly accused witnesses of lying while in their presence, in an effort to intimidate them:

    - "It also doesn't address the problem that this witness makes up this phony story about other resumes. I mean, it doesn't make up ... it doesn't explain why he comes up with all these excuses. So if he's ever asked on the stand, did you ever say anything about percentage, and denies it, you're going to have to discredit him because he makes up all these other stories. ... JUDGE STECKLER: That's an argument for the brief." (Tr. 845:15-846:5.)

    - "So on the stand, he says I never said it. But in his affidavit, he says I don't recall. That is a significant inconsistency in this case and I'm glad Mr. Choi isn't here, given his other inconsistencies. So that's why that statement is relevant. JUDGE STECKLER: That was not necessary, please." (Tr. 1103:14-19.)

    - "MR. ROSENFELD: Well, there's a certain credibility issue when a witness answers the questions with this kind of evasive answer. ... JUDGE STECKLER: Then save that for the credibility section of your brief. MR. ROSENFELD: Well, I'm entitled to push it and make him even more discredited. ... JUDGE STECKLER: We don't need to be hearing that right now, Mr. Rosenfeld." (Tr. 2950:21-2951:13.)

- Mr. Rosenfeld made an inappropriate comment about Everport President George Lang's Scottish ethnicity: "Q I didn't ask about unions. Let's try it again. It's a specific question. You're a clever Scots person, so you can figure this out. MR. REMAR: Come on. That's patronizing and offensive. MR. ROSENFELD: Let me try the question -- I withdraw that." (Tr. 1874:24-1875:4.)

- When Mr. Akrotirianakis stated that he did not want to coach a witness, Mr. Rosenfeld insisted that he would accuse him of coaching regardless of what Mr. Akrotirianakis said: "MR. AKROTIRIANAKIS: Yeah, I just, I think we're going to be here a really long time for no purpose. And I don't want to coach the witness and be accused of that but -- MR. ROSENFELD: Well, you will be no matter what you say so why don't we just get on with the questions. JUDGE STECKLER: You all have got to stop this." (Tr. 713:4-9.)

- In the presence of witnesses, Mr. Rosenfeld also repeatedly accused Respondents' counsel of coaching in response to simple objections:

    - "MR. AKROTIRIANAKIS: Objection. That misstates his testimony. MR. ROSENFELD: This is cross-examination. That's why we're going to be all day, because I'm not going to put up, Your Honor, with that kind of interruption when he's trying to coach the witness." (Tr. 1142:16-21.)

    - "Q Okay, so why don't you read -- would you – you've already testified that you think that the agreement effectively functions that way and that employers can consider anybody dispatched as probationary up to a certain point. MR. REMAR: That's not what he said. MR. CHENEY: Yeah, it misstates testimony. MR. ROSENFELD: This is cross-examination. You know, if we're going to keep -- MR. REMAR: Yeah, but when you're saying this is what -- MR. ROSENFELD: I am going to yell -- JUDGE STECKLER: Then he can answer yes or no. Q BY

MR. ROSENFELD: Mr. Bartelson, let me ask a -- do you need coaching from Mr. Remar or -- JUDGE STECKLER: Don't ask that question." (Tr. 2549:15-1550:3.)

Even now, Mr. Rosenfeld cannot help himself. Rather than acknowledging his inappropriate behavior, he dismisses it as "bait[ing]" and attacks Mr. Akrotirianakis as "thinned-skinned" (*sic*) for expecting a minimum level of professionalism from his adversaries. (IAM Supporting Brief at 22.) The record excerpts quoted above make clear that Mr. Rosenfeld went far beyond "bait[ing]"—he repeatedly exceeded the bounds of acceptable conduct, including disregarding multiple admonishments from the ALJ. Even if Mr. Rosenfeld as just trying to "bait" Mr. Akrotirianakis, that on its own is childish, unprofessional behavior. It displays the same "manifest disrespect for … opposing counsel" for which the Board has previously admonished him. *Nat'l Right to Work Legal Defense & Educ. Fund*, 36 NLRB AMR 38, 2008 WL 8582131 (June 26, 2008).

In sum, Mr. Rosenfeld's conduct in the hearing of this matter warranted imposition of the admonition given by the ALJ and warrants further sanctions from the Board.

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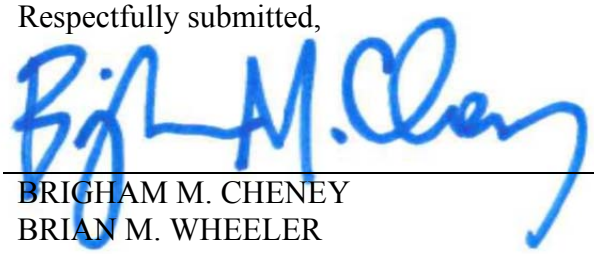
III. CONCLUSION

For the foregoing reasons, the Board should reject the Charging Party's exceptions and the arguments in the Charging Party's supporting brief in their entirety.

Date: December 10, 2018

Respectfully submitted,



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Respectfully submitted,

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CERTIFICATE OF SERVICE

[FRCP 5(B)]

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 20 Pacifica, Suite 1100, Irvine, California 92618.

On December 10, 2018, I served the following document(s) described as **ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS BY EVERPORT TERMINAL SERVICES INC.** on the interested parties in this action as follows:

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☑ **BY EMAIL:** My electronic service address is DDunham@aalrr.com. Based on a written agreement of the parties pursuant to Fed. Rules Civ. Proc., Rule 5(b)(2)(E) to accept service by electronic means, I sent such document(s) to the email address(es) listed above or on the attached Service List. Such document(s) was scanned and emailed to such recipient(s) and email confirmation(s) will be maintained with the original document in this office indicating the recipients' email address(es) and time of receipt.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on December 10, 2018, at Irvine, California.

Donna P. Dunham

Donna L. Dunham